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EVIDENTIARY HEARINGS IN CALIFORNIA CAPITAL HABEAS PROCEEDINGS: WHAT ARE THE RULES OF DISCOVERY?

Judge Joan Comparet-Cassani*

I. INTRODUCTION

The California Constitution guarantees a person, improperly deprived of his or her liberty, the right to petition for a writ of habeas corpus.[1] The California Supreme Court has original jurisdiction for capital cases on automatic appeal and in any collateral proceeding.[2] Sections 1473 through 1508 of the California Penal Code govern habeas petitions.[3]

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1. CAL. CONST. art. I, § 11.
2. *See* CAL. CONST. art. VI, §§ 10-11.
3. Penal Code section 1473 provides:

(a) Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.

(b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:

(1) False evidence that is substantially material or probative on the issue of guilt or punishment was introduced against a person at any hearing or trial relating to his incarceration; or

(2) False physical evidence, believed by a person to be factual, probative, or material on the issue of guilt, which was known by the person at the time of entering a plea of guilty, which was a material factor directly related to the plea of guilty by the person.

(c) Any allegation that the prosecution knew or should have known of the false nature of the evidence referred to in subdivision (b) is immaterial to the prosecution of a writ of habeas corpus brought pursuant to subdivision (b).

(d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

CAL. PENAL CODE § 1473 (West 1982). Penal Code section 1474 provides:

> APPLICATION FOR, HOW MADE. Application for the writ is made by petition, signed either by the party for whose relief it is intended, or by some person in his behalf, and must specify:
>
> 1. That the person in whose behalf the writ is applied for is imprisoned or restrained of his liberty, the officer or person by whom he is so confined or restrained, and the place where, naming all the parties, if they are known, or describing them, if they are not known;
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> 2. If the imprisonment is alleged to be illegal, the petition must also state in what the alleged illegality consists;
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> 3. The petition must be verified by the oath or affirmation of the party making the application.

CAL. PENAL CODE § 1474 (West 1982). Penal Code section 1475 provides, in relevant part:

> The writ of habeas corpus may be granted in the manner provided by law. If the writ has been granted by any court or a judge thereof and after the hearing thereof the prisoner has been remanded, he shall not be discharged from custody by the same or any other court of like general jurisdiction, or by a judge of the same or any other court of like general jurisdiction unless upon some ground not existing in fact at the issuing of the prior writ. Should the prisoner desire to urge some point of law not raised in the petition for or at the hearing upon the return of the prior writ, then, in case such prior writ had been returned or returnable before a superior court or a judge thereof, no writ can be issued upon a second or other application except by . . . the Supreme Court or some judge thereof . . . . In the event, however, that the prior writ was returned or made returnable before a court of appeal or any judge thereof, no writ can be issued upon a second or other application except by the Supreme Court or some judge thereof, and such writ must be made returnable before said Supreme Court or some judge thereof.
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> Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application or application have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise.
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> Whenever the person applying for a writ of habeas corpus is held in custody or restraint by any officer of any court of this state or any political subdivision thereof, or by any officer of this state, or any political subdivision thereof, a copy of the application for such writ must in all cases be served upon the district attorney of the county wherein such person is in custody or restraint at least 24 hours before the time at which said writ is made returnable and no application for such writ can be heard without proof of such service in cases such service is required.
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> . . . .

CAL. PENAL CODE § 1475 (West 1982). Penal Code section 1477 provides:

> WRIT, WHAT TO CONTAIN. The writ must be directed to the person having custody of or restraining the person on whose behalf the application is made, and must command him to have the body of such

person before the Court or Judge before whom the writ is returnable, a time and place therein specified.

CAL. PENAL CODE § 1477 (West 1982). Penal Code section 1480 provides:

RETURN, WHAT TO CONTAIN. The person upon whom the writ is served must state in return, plainly and unequivocally:

1. Whether he has or has not the party in his custody, or under his power or restraint;

2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint;

3. If the party is detained by virtue of any writ, warrant, or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the Court or Judge on the hearing of such return;

4. If the person upon whom the writ is served had the party in his power or custody, or under his restraint, at any time prior or subsequent to the date of the writ of habeas corpus, but has transferred such custody or restraint to another, the return must state particularly to whom, at what time and place, for what cause, and by what authority such transfer took place;

5. The return must be signed by the person making the same, and, except when such person is a sworn public officer, and made such return in his official capacity, it must be verified by his oath.

CAL. PENAL CODE § 1480 (West 1982). Penal Code section 1481 provides: "BODY MUST BE PRODUCED, WHEN. The person to whom the writ is directed, if it is served, must bring the body of the party in his custody or under his restraint, according to the command of the writ, except in the cases specified in the next section." CAL. PENAL CODE § 1481 (West 1982). Penal Code section 1484 provides:

PROCEEDINGS ON THE HEARING. The party brought before the Court or Judge, on the return of the writ, may deny or controvert any of the material facts or matters set forth in the return or except to the sufficiency thereof, or allege any fact to show either that his imprisonment detention is unlawful, or that he is entitled to his discharge. The Court or Judge must thereupon proceed in a summary way to hear such proof as may be produced against such imprisonment or detention, or in favor of the same, and to dispose of such party as the justice of the case may require, and have full power and authority to require and compel the attendance of witnesses, by process of subpoena and attachment, and to do and perform all other acts and things necessary to a full and fair hearing and determination of the case.

CAL. PENAL CODE § 1484 (West 1982). Penal Code section 1506 provides:

An appeal may be taken to the court of appeal by the people from a final order of a superior court made upon the return of a writ of habeas corpus discharging a defendant or otherwise granting all or any part of the relief sought, in all criminal cases, excepting criminal cases where judgment of death has been rendered, and in such cases to the Supreme Court; and in all criminal cases where an application for a writ of habeas corpus has been heard and determined in a court of appeal, either the defendant or the people may apply for a hearing in the Supreme Court. Such appeal shall be taken and such application for hearing in the Supreme Court shall be made in accordance with rules to be laid down by the Judicial Council. If the people appeal from an

Section 1484 has been interpreted to provide for evidentiary hearings when ordered by the California Supreme Court.[4] The purpose of evidentiary hearings is to decide the material facts at issue as framed by the pleadings.[5] However, neither the statute nor case law provides for discovery at these evidentiary hearings. This paper will address the problems presented by the lack of discovery at these evidentiary hearings and recommend that statutory rules for reciprocal discovery be provided by the legislature.

Both federal and state case law provide support for the conclusion that habeas corpus proceedings are not criminal or civil in nature, but are quasi-civil. Federal law does not require that states provide habeas relief. Thus, when states do provide such relief, whether discovery should be made available at such hearings is a state law issue.

This paper will recommend that the legislature enact a discovery statute specifically drafted for habeas corpus proceedings which would provide for reciprocal discovery based on a showing of good cause. This statute is needed because the civil discovery statute is too broad and the criminal discovery statute, by its own terms, is inapplicable to the parties and issues in dispute in a habeas proceeding. Without this legislation, the efficacious nature of habeas corpus will be

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order granting the discharge or release of the defendant, or petition for hearing in either the court of appeal or the Supreme Court, the defendant shall be admitted to bail or released on his own recognizance or any other conditions which the court deems just and reasonable, subject to the same limitations, terms, and conditions which are applicable to, or may be imposed upon, a defendant who is awaiting trial. If the order grants relief other than a discharge or release from custody, the trial court or the court in which the appeal or petition for hearing is pending may, upon application by the people, in its discretion, and upon such conditions as it deems just stay the execution of the order pending final determination of the matter.

CAL. PENAL CODE § 1506 (West 1982). Penal Code section 1508(a) provides: "A writ of habeas corpus issued by the Supreme Court or a judge thereof may be made returnable before the issuing judge or his court, before any court of appeal or judge thereof, or before any superior court or judge thereof." CAL. PENAL CODE § 1508(a) (West 1982).

4. *See* CAL. CONST. art. I, §§ 10-11. Original jurisdiction in capital cases is before the California Supreme Court. Therefore, only that court may order an evidentiary hearing. *Id.*; CAL. PENAL CODE § 1506 (West 1982). People v. Romero, 883 P.2d 388, 393 (Cal. 1994); *In re* Hochberg, 471 P.2d 1, 5-6 n.4 (Cal. 1970).

5. *See In re* Serrano, 895 P.2d 936, 941-42 (Cal. 1995); People v. Duvall, 886 P.2d 1252, 1261 (Cal. 1995).

thwarted. Discovery issues, such as whether discovery is available, the scope of discovery, and the showing required for a grant of discovery, will continue to be decided on a case by case basis. This promotes inconsistencies in rulings, needless re-litigation of the same issues, and as a result, wasted court time.

II. BACKGROUND

A. *Evidentiary Hearings in Capital Habeas Corpus Proceedings*

In the state of California, 503 inmates have been sentenced to death and await execution on death row.[6] While the California Supreme Court reviews each inmate's automatic appeals, the less familiar habeas corpus proceedings are occurring in courtrooms across the state.[7]

In addition to challenging a conviction by appeal, a capital defendant may also file a petition for writ of habeas corpus.[8] The petition is used to raise issues which may not be raised on appeal and which require evidentiary support not in the appellate record.[9] After considering the issues as

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6. *See* DEPARTMENT OF CORRECTIONS, CONDEMNED INMATE LIST SUMMARY (1998).

7. *See* CAL. PENAL CODE § 1484 (West 1982). These hearings are sometimes referred to as "reference hearings."

8. The phrase literally means "You have the body." WILKES, FEDERAL AND STATE POST CONVICTION REMEDIES AND RELIEF § 2-2 at 42 (1992). "The role that the Writ of Habeas Corpus plays is largely procedural. It does not decide the issues and cannot itself require the release of the petitioner. Rather, the writ commands the person having custody of the petitioner to bring the petitioner before the court or judge before whom the writ is returnable . . . ." *Id.* (citations omitted). The Writ of Habeas Corpus gets its name from the portion of the writ commanding the custodian to have the body (habeas corpus, in Latin) of the detained person before the court or judge at the time specified in the writ." People v. Romero, 883 P.2d 388, 391 & n.4 (Cal. 1994) (emphasis in original). *See also* CAL. PENAL CODE § 1481 (West 1982). In fact, unless a criminal defendant is in custody, habeas will not lie. *See generally* Moore v. Municipal Court, 339 P.2d 196 (Cal. Ct. App. 1959).

9. For example, habeas corpus will not lie to review procedural irregularities, errors in law, or insufficiency of the evidence, or where the lower court acted within its jurisdiction. 6 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW § 3346, at 4149 (2d ed. 1989). Habeas corpus will not lie to retry issues of fact or the merits of a defense and is not an available remedy "with respect to the admission or exclusion of evidence, or to correct other errors of procedure occurring on the trial." *In re* Lindley, 177 P.2d 918, 927 (Cal. 1947).

framed by the petition, response, and traverse,[10] the California Supreme Court determines whether or not the petitioner has made a prima facie case for relief.[11] The court then decides whether petitioner's entitlement to relief depends upon the resolution of any material facts in dispute.[12] If a resolution of material facts is required, the court orders an evidentiary hearing, appoints a "referee"[13] to take evidence, and specifies the issues to be addressed and resolved at the hearing.[14]

An evidentiary hearing is a trial where testimony is taken and evidence submitted.[15] It is, however, a very limited trial that addresses only those issues described in the California Supreme Court's order.[16] Even though the evidentiary hearing is usually held in a courtroom in superior court, the hearing is actually "before" the California Supreme Court.[17]

Few attorneys or prosecutors have handled capital habeas evidentiary hearings and even fewer judges have presided over them.[18] However, the steady increase in the number of death row inmates ensures a corresponding increase in the number of evidentiary hearings.[19] In fact, capital habeas

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10. A traverse is analogous to the answer in a civil proceeding wherein the petitioner (defendant) may deny or controvert anything stated in the return filed by the respondent. *In re* Saunders, 472 P.2d 921, 923 (Cal. 1970). For a more thorough discussion, see *In re* Duvall, 886 P.2d 1252, 1261 (Cal. 1995).

11. *See In re* Saunders, 472 P.2d at 931; *In re* Hochberg, 471 P.2d 1, 45 n.4 (Cal. 1970).

12. *See* People v. Romero, 883 P.2d 388, 393 (Cal. 1994).

13. A sitting or retired judge. *See* CAL. PENAL CODE § 1508(a) (West 1982); *In re* Hochberg, 471 P.2d at 4.

14. *See In re* Duvall, 886 P.2d at 1261; *Romero,* 883 P.2d at 393.

15. *See In re* Hochberg, 471 P.2d at 5-6 n.4.

16. *See id.*

17. Appellate courts are not equipped to have prisoners brought before them and conduct testimonial hearings. *See Romero,* 883 P.2d at 393; *In re* Hochberg, 471 P.2d 1, 5-6 (Cal. 1970). Therefore, the California Supreme Court appoints a referee to take evidence and made recommendations as to the resolution of disputed factual issues. *Romero,* 883 P.2d at 393.

18. This is based on the author's experience as a deputy attorney general when she conducted such hearings.

19. In 1988-89, 803 original habeas petitions were filed in the California Supreme Court. *See In re* Harris, 855 P.2d 391, 396 n.4 (Cal. 1993). In 1990-91, 1,022 original habeas corpus petitions were filed in the California Supreme Court—an increase of 219 petitions. *See In re* Clark, 855 P.2d 729, 760-61 n.36 (Cal. 1993). In 1995-96, the number of capital habeas petitions had grown to 1,803—an increase of 781 petitions in five years. *See* discussion *infra* Part II.B.4.

petitioners may file one or more petitions for a writ of habeas corpus.[20] The California Supreme Court has tightened the deadlines for filing such petitions by adopting certain rules,[21] and in some recent cases has limited the grounds for filing successive petitions.[22]

Nevertheless, the motive to seek collateral review is obvious. Unlike the civil litigant who is interested in an end to litigation after a final judgment, a convicted capital defendant does not have the same incentive. Therefore, the probability exists that more, rather than fewer, petitions will be filed. In fact, statistics support this conclusion. Between 1990 and 1991, 1,022 original habeas corpus petitions were filed in the California Supreme Court.[23] That number grew to 1,803 between 1995 and 1996.[24] Because of the large number of current capital petitions, statutory rules of discovery for habeas proceedings would promote a quicker resolution of these pending cases and end litigation on this issue.[25]

As stated, one issue that has repeatedly surfaced is whether discovery should be available to a habeas petitioner, and if so, which discovery statute applies.[26] The answer to these questions requires a discussion of the nature of habeas proceedings and an analysis of the fundamental difference between criminal trial proceedings and post-conviction proceedings. Habeas corpus proceedings are quasi-civil because they do not involve the underlying criminal conviction, but address a claimed violation of one's civil rights. Habeas corpus proceedings occur after the criminal trial and, usually, after the appeal. The United States Constitution provides

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20. CAL. PENAL CODE § 1475 (West 1982).

21. CALIFORNIA RULES OF COURT, SUPREME COURT POLICIES REGARDING CASES ARISING FROM JUDGMENT OF DEATH 585-87 (1990).

22. The court provided:

> Absent justification for the failure to present all known claims in a single timely petition for writ of habeas corpus, successive and/or untimely petitions will be summarily denied. The only exception to this rule are petitions which allege facts which, if proven, would establish that a *fundamental* miscarriage of justice occurred as a result of the proceedings leading to conviction and/or sentence.

In re Clark, 855 P.2d 729, 760 (Cal. 1993). *See also In re* Harris, 855 P.2d 391 (1993).

23. *See In re* Clark, 855 P.2d 729, 761-62 n.36 (Cal. 1993).

24. *See* JUDICIAL COUNCIL OF CALIFORNIA, ANNUAL REPORT 6 (1997).

25. *See* discussion *infra* Part II.B.4.

26. *See* People v. Gonzalez, 800 P.2d 1159, 1202-06 (Cal. 1990).

certain rights to a criminal defendant at trial. But these rights do not automatically apply to a habeas corpus proceeding.[27] In fact, federal law does not require that those trial rights granted to criminal defendants be provided to petitioners in habeas corpus proceedings. This permits states to construct habeas relief within the confines of their constitutions, statutes, and case law. However, if discovery is granted, as this article recommends, such discovery should be reciprocal. In addition, it will be shown that the discovery statutes in place are inadequate. Civil discovery, which permits interrogatories, depositions, and requests for admissions are too broad, and would result in longer habeas proceedings and possibly an abuse of the writ. Moreover, the criminal discovery statute will not work in a habeas setting since its language is inapplicable to the parties and issues involved.

B. *Habeas Corpus Is a Collateral Proceeding*

1. *The Writ of Habeas Corpus Is Designed to Address Civil Rights Violations*

The United States imported the Great Writ from the English Common Law.[28] The First Judiciary Act of 1789 provided in part that

> [t]he several courts of the United States and the several justices and judges of such courts . . . shall have the power to grant Writs of Habeas Corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution or of any treaty of the United States.[29]

Initially, petitions for writ of habeas corpus were limited to challenging the jurisdiction of state courts.[30] However, the scope and function of the writ changed and expanded. The writ now lies either where criminal proceedings have been found unfair or to review important questions of law which

27. *See* discussion *infra* Part II.B.2.

28. *See* People v. Romero, 883 P.2d 388, 390 (Cal. 1994).

29. The First Judiciary Act of 1789, ch.20, § 14, 1 Stat. 81-82 (1789); McClesky v. Zant, 499 U.S. 467, 477-78 (1990); Townsend v. Sain, (1963) 372 U.S. 293, 311 (1963); *Ex parte* Royall, 117 U.S. 241 (1886); Martin v. Hiatt, 174 F.2d 350, 351 & n.2 (5th Cir. 1949).

30. *See Ex parte* Long, 45 P. 1057 (Cal. 1896).

could not otherwise be raised.[31]

> The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action. Its pre-eminent role is recognized by the admonition in the Constitution: [t]he privilege of the Writ of Habeas Corpus shall not be suspended. The scope and flexibility of the writ—its capacity to reach all manner of litigation—its ability to cut through barriers of form and procedural mazes—have always been emphasized and zealously guarded by courts and lawmakers. The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected.[32]

Habeas is grounded on the principal that government must always be accountable for the imprisonment of an individual.[33] Habeas lies to test proceedings so fundamentally lawless that imprisonment pursuant to such proceedings is not merely erroneous, but void.[34]

The writ of habeas corpus is brought by the petitioner to enforce a civil right which he claims against those holding him in custody.[35] The proceeding is instituted by the petitioner for his liberty and not by the government to punish him for a crime.[36] Furthermore, habeas review is concerned not with the original judgment rendered against the petitioner, but with the constitutionality and lawfulness of the petitioner's custody.[37]

2. *Habeas Corpus Proceedings Are Quasi-Civil*

The United States Supreme Court has generally characterized habeas corpus proceedings as civil in nature.[38] Fur-

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31. 6 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW § 3331, at 4125, § 3346, at 4149 (2d ed. 1989).

32. Harris v. Nelson, 394 U.S. 286, 291 (1969).

33. *See* Herrera v. Collins, 506 U.S. 390, 400-01 (1993).

34. *See Ex parte* Royall, 117 U.S. at 245.

35. *See* CAL. PENAL CODE § 1474 (West 1982); *Ex parte* Tong, 108 U.S. 556, 559-60 (1888).

36. *See* Fay v. Noia, 372 U.S. 391 (1963).

37. *See Ex parte* Tong, 108 U.S. at 559-60; People v. Romero, 883 P.2d 388, 390-91 (Cal. 1994).

38. "Post conviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding it-

thermore, the California Supreme Court has characterized habeas corpus proceedings as neither felony nor criminal proceedings.[39] Other states have held that such proceedings are essentially civil, since the purpose of the proceeding is not to determine guilt or innocence, but to determine whether the person is lawfully in custody.[40] Witkin also states that "it is clear that habeas corpus proceedings are not criminal proceedings and do not come within the definition of a criminal action."[41]

A petition for writ of habeas corpus neither tries a criminal charge nor has as its aim the conviction of a crime.[42] Rather it is a remedy used to compel the state to comply with constitutional guarantees.[43] The issue presented by the writ is not the petitioner's guilt or innocence, for that was decided at trial. Therefore, the only question is whether the petitioner's constitutional rights were violated.[44] The fact that habeas corpus provisions are located in the California Penal Code is not determinative of their nature.[45] Those provisions neither define offenses, nor establish defenses.[46] They do, however, create a procedural remedy for civil violations.[47]

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self, and, it is in fact considered to be civil in nature." Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987). "A post conviction proceeding is not part of the criminal process itself, but is instead a civil action designed to overturn a presumptively valid criminal judgment." Murray v. Girratano, 492 U.S. 1, 13 (1989) (O'Connor, J., concurring). "It is well settled that habeas corpus is a civil proceeding." Bowder v. Illinois, 434 U.S. 257, 269 (1978).

39. "[W]e need not involve ourselves in the parties' efforts to characterize habeas corpus proceedings as either criminal (respondent) or civil (petitioner)." In re Head, 721 P.2d 65, 66 n.4 (Cal. 1986). "[T]he present proceeding [writ of habeas corpus] is not a felony proceeding." In re Weber, 523 P.2d 229, 240 (Cal. 1974). "The writ of habeas corpus, although granted to inquire into the legality of one imprisoned in a criminal prosecution, is not a proceeding in that prosecution, but on the contrary, is an independent action instituted by the applicant to secure his discharge from such imprisonment." France v. Superior Court, 255 P. 815, 817 (Cal. 1927).

40. *See* Daley v. Fitzgerald, 526 N.E.2d 131, 134 (Ill. 1998); Gibson v. Dale, 319 S.E.2d 806, 813 n.7 (W. Va. 1984); Hithe v. Nelson, 471 P.2d 596, 598 (Colo. 1970); *In re* Dean, 251 A.2d 347, 349 (Del. 1969).

41. 3 B.E. WITKIN, CALIFORNIA PROCEDURE § 21, at 52 (3d. ed. 1998).

42. *See In re* Head, 721 P.2d at 69.

43. *See id.* at 67.

44. *See* Herrera v. Collins, 506 U.S. 390, 394 (1993).

45. *See In re* Head, 721 P.2d 65, 67 (Cal. 1986).

46. *See* CAL. PENAL CODE §§ 1473-1475, 1477, 1480-1481, 1484, 1506, 1508 (West 1982).

47. *See id.*

In a criminal proceeding, the government gathers evidence, files charges, and attempts to overcome the presumption of innocence.[48] However, it is the petitioner who initiates the habeas process in an attempt to overturn a presumptively valid judgment.[49] The petitioner, as the moving party, must allege specific facts warranting relief, carry the burden of proof, and gather whatever evidence exists in support of his claims.[50]

Even though habeas proceedings are not criminal, they may affect one's life or liberty. Depending on the relief sought, the remedy could involve the grant of a new trial, a new penalty phase, commutation of the death penalty, or release from custody.[51] Additionally, the court in which the petition is pending has power akin to a court of equity—to craft an appropriate remedy.[52] What remedy is appropriate in a given case depends on "what the justice of the case may require . . . ."[53] For these reasons, even though the petition involves allegations of a civil wrong, the ultimate outcome

48. *See* Herrera v. Collins, 506 U.S. 390, 400-01 (1993); Ross v. Moffitt, 417 U.S. 600, 610-11 (1974).

49. *Ross,* 417 U.S. at 610-11. "A petition for writ of habeas corpus seeks to attack a presumptively final criminal judgment . . . for purposes of collateral attack all presumptions favor the truth, accuracy and fairness of the conviction and sentence . . . . We presume the regularity of proceedings that resulted in a final judgment." *In re* Duvall, 886 P.2d 1252, 1258 (Cal. 1995).

> Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears. The purpose of the trial stage . . . is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt . . . . Thus, in the eyes of the law, petitioner does not come before the court as one who is "innocent," but on the contrary as one who has been convicted by due process of law . . . ."

Herrera, 506 U.S. at 399.

50. *See* CAL. PENAL CODE § 1474 (West 1982). In a habeas proceeding, the burden of proof is on the petitioner. *In re* Martin, 744 P.2d 374, 391 (Cal. 1987). The petitioner must produce evidence in support of his allegations. *In re* Fields, 800 P.2d 862, 867 (Cal. 1990). The petitioner must produce this evidence by a preponderance of the evidence. Curl v. Superior Court, 801 P.2d 292, 293 (Cal. 1990). "The petition should state fully and with particularity the facts on which relief is sought . . . as well as include copies of . . . evidence supporting the claim . . . ." *In re* Duvall, 886 P.2d at 1258.

51. *See Herrera,* 506 U.S. at 394.

52. *See In re* Harris, 855 P.2d 391, 413 (Cal. 1993); McClesky v. Zant, 499 U.S. 467, 489 (1991).

53. CAL. PENAL CODE § 1484 (West 1982). *See* CAL. PENAL CODE §§ 1487, 1489 (West 1982). *See In re* Harris, 855 P.2d at 413.

could affect the life and liberty of the petitioner. This characteristic removes habeas proceedings from the category of pure civil actions. Thus, because of the remedy sought and the violation alleged, habeas proceedings are not purely criminal proceedings. Rather, they are quasi-civil proceedings.

3. *State Habeas Corpus Proceedings Are Not Mandated by Federal Law.*

State habeas proceedings are founded on state law. States are not obligated under federal law to afford criminal defendants collateral relief.[54] Nor does the U.S. Constitution require that a state grant a prisoner unlimited habeas corpus or post-conviction relief proceedings.[55] Only the right to petition the federal courts for habeas corpus relief and the right of the federal courts to grant a petition for habeas corpus are guaranteed by the U.S. Constitution.[56] When states do provide habeas corpus proceedings,[57] the states have substantial discretion to develop and implement post-conviction review since the U.S. Constitution does not dictate the exact form for such assistance.[58]

As stated, state habeas corpus proceedings are quasi-civil in nature, and are used to attack the legality of the petitioner's punishment, not to inquire into any underlying

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54. "States have no obligation to provide this avenue [habeas corpus] of relief." Pennsylvania v. Finley, 481 U.S. 551, 557 (1987). "[I]t is clear that the state need not provide any appeal at all." Ross v. Moffitt, 417 U.S. 600, 610-11 (1974); *Pennsylvania,* 481 U.S. at 586. "The duty of the state under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction . . . ." *Id.* at 559.

> [T]he decision below rests on a premise that we are unwilling to accept that when a state chooses to offer help to those seeking relief from conviction, the Federal Constitution dictates the exact form such assistance must assume. On the contrary, in this area the states have substantial discretion to develop and implement programs to aid prisoners seeking to secure post conviction review.

Pennsylvania, 481 U.S. at 559. "[W]hile habeas corpus is recognized in Article 1, Section 9, Clause 2 of the United States Constitution, that provision does not oblige the states to afford a habeas corpus remedy." *In re* Clark, 855 P.2d 729, 737 n.2 (1993).

55. *See Pennsylvania*, 481 U.S. at 557.

56. *See* Preiser v. Rodriquez, 411 U.S. 475, 484-85 (1973).

57. Habeas corpus statutes have been enacted in all the United States. *See* BLACK'S LAW DICTIONARY 638 (5th ed. 1979).

58. *See Pennsylvania*, 481 U.S. at 559.

criminal acts.

> The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of but into the right to liberty notwithstanding the act. The prosecution against [the petitioner] is a criminal prosecution, but the writ of habeas which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody under the criminal process. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime.[59]

There are several important fundamental differences between a criminal trial and post-conviction relief. For example, fundamental constitutional rights obtain at a criminal trial because the state must overcome the defendant's presumption of innocence to deprive him of his freedom. The purpose of these protections is to ensure a fair trial, to allow a defendant to prepare a defense, and to ensure a meaningful adversary process.[60]

Once a defendant is convicted, however, the presumption of innocence yields to a presumptively valid conviction.[61] Habeas proceedings attack that conviction after relief has been denied through direct review.[62] It is collateral in nature be-

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59. *Ex parte* Tong, 108 U.S. 556, 559-60 (1883).

60. The Sixth Amendment of the United States Constitution protects both the right of confrontation and the right of compulsory process: In all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. Both clauses are made obligatory on the states by the Fourteenth Amendment. *See* Herrera v. Collins, 506 U.S. 390, 398-99 (1993); Ross v. Moffitt, 417 U.S. 600, 610 (1974); People v. Gonzalez, 800 P.2d 1159, 1206 (Cal. 1990).

61. *See Herrera*, 506 U.S. at 399; *Gonzalez*, 800 P.2d at 1206.

62. Once a defendant has been convicted and sentenced to death, the judgment and sentence is automatically appealed directly to the California Supreme Court. *See* CAL. CONST. art. VI, §§ 10-11; CAL. PENAL CODE §§ 1239, 1506 (West 1996). Because any and all trial errors as shown in the transcript of the proceedings should be raised on appeal, that process is the direct review of the trial in superior court. *See* CAL. PENAL CODE § 1259 (West 1982). If that review

cause the petitioner is not confined to his appellate record and may submit any evidence relevant to his allegations.[63] Thus, habeas corpus is even further removed from the crime, the trial, and the appeal and is not part of the criminal proceeding. For that reason, there is no federal requirement that the entire array of due process protections available to a criminal defendant be provided in habeas proceedings.[64] One is not entitled to constitutional protections in post conviction proceedings on the basis that such protections were afforded at the criminal trial.[65] Neither the Due Process Clause, which is concerned only with the deprivation of one's property or liberty, nor fundamental fairness requires a different result.[66]

Different proceedings implicate different constitutional considerations. For example, a habeas petitioner does not have either a constitutional right to the assistance of counsel[67] or a right to be present at habeas proceedings,[68] and he is

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is denied and both the judgment and sentence affirmed, the defendant may attack the conviction by a petition for writ of habeas corpus, a collateral proceeding. *See In re* Clark, 855 P.2d 729 (Cal. 1993); *In re* Harris, 855 P.2d 391 (Cal. 1993). However, direct appeal is the primary avenue of review in a capital case.

63. *See In re* McVickers, 176 P.2d 40, 47 (Cal. 1946); *In re* Bell, 122 P.2d 22, 35 (Cal. 1942); *In re* Mooney, 73 P.2d 554, 567 (Cal. 1937).

64. *See* Pennsylvania v. Finley, 481 U.S. 551, 554-57 (1987). "At bottom, the decision below rests on a premise that we are unwilling to accept—that when a state chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Id.* at 559. "The duty of the state under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction." *Id.* at 556.

65. The United States Supreme Court in *Pennsylvania v. Finley*, 481 U.S. 551 (1987), explicitly rejected this theory. Fundamental fairness under the Due Process Clause limits constitutional rights to those so enumerated. The state's duty to a petitioner on collateral review is to assure that the petitioner has an adequate opportunity to fairly present his claims in the context of the appellate process. The state grant which allows habeas review is not based on the federal Constitution. Thus the source of the right and the nature of the proceedings are determinative. They do not require that the state duplicate those constitutional rights granted to a criminal defendant at trial. *See Pennsylvania,* 492 U.S. at 8-10.

66. *See Pennsylvania,* 492 U.S. at 8-10; Weatherford v. Bursey, 429 U.S. 545, 559 (1977); Ross v. Moffitt, 417 U.S. 600, 610 (1974).

67. *See* Coleman v. Thompson, 501 U.S. 722, 755-56 (1991); *Pennsylvania*, 481 U.S. at 551.

68. *See* Sanders v. United States, 373 U.S. 1, 20 (1963); Machibroda v. United States, 368 U.S. 487, 495 (1962).

not entitled to a jury trial.[69] It is also likely that a habeas petitioner, unlike a criminal defendant, may be called by the people to testify,[70] because the Fifth Amendment right against self-incrimination does not apply.[71] In fact, if petitioner refuses to testify, an adverse inference may be drawn.[72]

The fact that petitioner is a capital defendant does not alter any of these conclusions. The United States Supreme Court has stated that the fact that the petitioner is a capital defendant has no bearing on his procedural rights at state habeas proceedings.[73] Those safeguards afforded a capital defendant by the Eighth Amendment at his criminal trial provide sufficient reliability of the judgment.[74] Neither the

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69. *See* CAL. PENAL CODE § 1484 (West 1998).

70. The District Attorney of the county in which the charging document, "the information," is filed has original jurisdiction in criminal matters. CAL. GOV'T CODE §§ 26500 (West 1998). After conviction, in a capital case on automatic appeal, the State Attorney General represents the people on appeal. *See* CAL. CONST. art.V, § 13; CAL. GOV'T CODE § 12524 (West 1992). The District Attorney is to cooperate with the Attorney General. *See* CAL. PENAL CODE § 1256 (West 1996).

71. A verified petition is evidence. *See* Estate of Nicolas, 223 Cal. Rptr. 410, 419-20 (Ct. App. 1986). California Penal Code § 1474(3) (West 1996) requires that the petitioner verify the petition for writ of habeas corpus by oath or affirmation. It could be argued that petitioner thereby has waived his right not to testify, and may even be called by the people as a witness. *See infra* text accompanying notes 186-91.

72. "Respondent's motion to dismiss denied. The referee is directed to make findings of fact adverse to petitioner as to each question he is ordered to answer but declines to answer on the ground of self-incrimination." *See In re* Avena on Habeas Corpus, Supreme Ct. Mins. Aug. 14, 1991.

73. *See* Murray v. Girrantano, 492 U.S. 1, 10-11 (1989).

> We have simply refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus . . . . We think these cases require the conclusion that the rule of *Pennsylvania v. Finley* should apply no differently in capital cases than in non-capital cases. State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal. The additional safeguards imposed by the Eight Amendment at the trial stage of a capital case are . . . sufficient to insure the reliability of the process by which the death penalty is imposed.

Id. We "reject the suggestion that the principles [governing procedural default] of *Wainright v. Sykes* . . . apply any differently depending on the nature of the penalty a state imposes for violation of its criminal laws." Smith v. Murray, 477 U.S. 527, 528 (1986) (citation omitted). "Direct appeal is the primary avenue for review of a conviction or sentence; death penalty cases are no exception." Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

74. *See Murray,* 492 U.S. at 8-10.

Eighth Amendment nor the Due Process Clause of the U.S. Constitution "require yet another distinction between the rights of capital defendants and those in non-capital cases."[75]

Thus, whether a capital habeas petitioner should be entitled to discovery at an evidentiary hearing is a question of state law.[76] This conclusion is further buttressed by the fact that there is no general constitutional right to discovery in a criminal case.[77] The rule of *Brady v. Maryland*[78] did not create a constitutional right to discovery for criminal defendants, but simply assured a fair trial as mandated by the Due Process Clause by establishing minimum prosecutorial obligations.[79] The right to discovery is a trial right created by the courts in the interest of assuring a fair trial.

4. *Current Status of Discovery in Habeas Corpus Evidentiary Hearings in California*

As stated previously, a capital habeas evidentiary hear-

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75. *Id.* at 10.

76. The author submits this conclusion necessarily follows. "A habeas petitioner is not entitled to discovery as a matter of ordinary course." Bracy v. Gramley, 520 U.S. 899, 904 (1997). The Federal Constitution does not confer a general right to criminal discovery . . . ." People v. Gonzalez, 800 P.2d 1159, 1204 (Cal. 1990); Weatherford v. Bursey, 429 U.S. 545, 549 (1977). Rather, the courts created discovery. *See Gonzalez*, 800 P.2d at 1204; *Weatherford*, 429 U.S. at 549.

77. Pennsylvania v. Ritchie, 480 U.S. 39, 59-60 (1987); *Weatherford*, 429 U.S. at 854.

78. 373 U.S. 83, 85-87 (1963). In *Brady*, after the defendant had been convicted of first-degree murder, he learned that an accomplice who had been tried separately had confessed, and the confession had been suppressed. Brady v. Maryland, 373 U.S. 83, 84 (1963). The United States Supreme Court found that was a violation of the due process clause of the 14th Amendment. *Id.* at 86. It is a violation of due process when evidence material to guilt or innocence, irrespective of the good or bad faith of the prosecution is withheld. *Id.* at 85-87. Subsequently, in *Weatherford v. Bursey*, the people did not disclose the existence of an eyewitness who would testify at trial. *Weatherford*, 429 U.S. at 558-59. The court found that under *Brady*, the prosecutor was not required to make that disclosure. *Id.* at 559. And, the court stated:

> [T]he prosecution has the duty under the due process clause to insure that criminal trials are fair by disclosing evidence favorable to the defendant upon request . . . . It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. There is no general constitutional right to discovery in a criminal case and *Brady* did not create one.

Brady at 558-59.

79. *See Weatherford*, 429 U.S. at 559-60.

ing is a trial, albeit a limited trial. As in all trials, there are pretrial motions. Both criminal and civil statutes permit discovery.[80] Invariably, a capital petitioner in a habeas evidentiary hearing files a motion for discovery.[81] The referee must then determine whether discovery should be permitted. Because there is no case law directly on point, or any statute that permits discovery in this setting, the issue must be briefed. This requires setting a briefing schedule and calendar dates for formal argument. The time required to complete the briefing includes factors such as research time, preparation of papers, and the availability of all the parties at the same time for argument. However, this does not end the problem.

If the referee grants discovery, related issues must be decided. For example, should discovery be reciprocal? Should discovery be limited to the subject matter in the criminal discovery statute,[82] or should it include procedures available under the civil discovery statute?[83] Do constitutional, statutory, and other privileges apply? Are statements, writings, and interviews of the petitioner discoverable? Each of these issues must be briefed, argued, and decided. Furthermore, each of these decisions could be "appealed" by the losing party in a sui generis motion to the California Supreme Court.[84]

This is the current state of discovery in capital habeas evidentiary hearings. Not only does the resolution of discovery issues require an inordinate amount of time, but since

80. *See infra* Part III.C.

81. There are no published cases that deal with this issue and this statement is based on the author's experience as a deputy attorney general when she handled such matters. The fact that there are no published cases is not surprising. Justice Lucas' explanation why there are no published cases which deal with rulings on the merits of an exception to the sufficiency of a return to a habeas corpus petition, are applicable. Those comments are: "The absence of a published opinion dealing with this procedure in depth is likely due to the fact that appellate courts usually decide such motions without an opinion. Evidence of such action is thus found in the minutes of the court." *In re* Duvall, 866 P.2d 1252, 1269 n.5 (Cal. 1995). *See also In re* Avena on Habeas Corpus, Supreme Ct. Mins. Aug. 14, 1991.

82. CAL. PENAL CODE §§ 1054 (West 1999).

83. CAL. CIV. PROC. CODE §§ 2016 (West 1998).

84. *See In re* Avena on Habeas Corpus, Supreme Ct. Mins. Aug. 14, 1991. "Appealed" is in quotes because the parties are actually *before* the Supreme Court.

this procedure occurs individually in each evidentiary hearing, the procedure engenders and promotes a lack of uniformity. There is no methodology to facilitate the process and no case law on this issue. Consequently, long hearings are added to a proceeding that was intended to be swift. It is a procedure that engenders lack of uniformity in rulings and a waste of valuable court time. It is submitted that a discovery statute would resolve and cure most of these problems and, therefore, expedite the habeas proceeding.

Moreover, it is submitted that discovery has not been foreclosed in California. The California Supreme Court discussed the issue of discovery in habeas proceedings in *People v. Gonzalez*.[85] In *Gonzalez*, the convicted defendant filed a discovery request in the trial court even though no action was then pending and he had not filed a petition for writ of habeas corpus.[86] Concluding that the trial court lacked jurisdiction to order discovery, because there was no criminal proceeding before it, the *Gonzalez* court commented upon the appropriateness of discovery in a habeas setting.[87]

The *Gonzalez* court stated that its function did not include granting, approving, or ordering discovery.[88] Citing *Cooper v. Leslie Salt*,[89] the court stated that Rule 23 of the California Rules of Court, which allows an appellant to produce additional evidence,[90] does not "afford a party the facilities of the appellate court for exploratory investigation to try to develop facts sufficient to enable him to state a cause of action."[91] The *Gonzalez* court, in accord with *Cooper*, concluded that discovery is not appropriate where habeas is used as an investigative tool, where the petitioner has failed to state a prima facie case for relief, or where there is no pending action.[92]

However, *Gonzalez* did not hold that discovery is always

85. 800 P.2d 1159, 1202-08 (Cal. 1990).

86. People v. Gonzalez, 800 P.2d 1159, 1203 (Cal. 1990).

87. *Id.* at 1205-08.

88. *Id.* at .

89. 451 P.2d 406, 413 (Cal. 1969).

90. "Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part . . . ." CAL. R. CT. 23(b).

91. *Gonzalez*, 800 P.2d at 1206.

92. People v. Gonzalez, 800 P.2d 1159, 1205 (Cal. 1990).

inappropriate in the habeas setting. Rather, the California Supreme Court found *under the facts of that case* that they could not order discovery.[93] The court did not foreclose the possibility that discovery might be appropriate. In fact, it hinted at the possibility of court ordered discovery when it stated, "whatever role court-ordered discovery might *properly* play in a habeas corpus proceeding . . . " in another part of the opinion.[94] Thus, the California Supreme Court did not conclude that discovery is not available in habeas proceedings. Moreover, the court's concerns about the propriety of issuing a discovery order itself would be resolved in the habeas evidentiary setting since the referee, not the court, would make the order.[95] The propriety of that grant of discovery will next be discussed.

III. A STATUTE OF RECIPROCAL DISCOVERY IS NEEDED

A. *Reciprocal Discovery Would Advance the Purpose of the Evidentiary Hearing*

Neither federal nor state law permits post-conviction discovery without a pending petition for writ of habeas corpus.[96] However, once a petition has been filed and an evidentiary hearing ordered, nothing precludes a state from providing discovery upon an appropriate showing. Many reasons favor granting discovery for a habeas corpus evidentiary hearing. For example, discovery would save court time since both sides could prepare their presentation of evidence in advance of the hearing, which would include cross-examination of the opponent's witnesses. Discovery would assist in deciding which witnesses to call and determine whether expert testi-

93. *Id.* at 1204.

94. *Id.* at 1205 (emphasis added).

95. As shown earlier, appellate courts are not the appropriate forum for the appearance of witnesses and the taking of testimony. "Because appellate courts are ill-suited to conduct evidentiary hearings, it is customary for appellate courts to appoint a referee to take evidence and make recommendations as to the resolution of disputed factual issues." *See* People v. Romero, 883 P.2d 388, 393 (Cal. 1994). Thus, the referee sitting in a trial court in a superior court, has the court personnel, bailiff, and security available so that the petitioner may be present, and witnesses testify in the appropriate setting.

96. *See* Calderon v. United States, 98 F.3d 1102, 1106-08 (9th Cir. 1996); *Gonzalez,* 800 P.2d at 1204-07.

mony is required. It would also promote the uncovering of perjury by providing the information necessary to investigate claims made and thus lessen the amount of actual court time.

Once an evidentiary hearing has been ordered, the petitioner has made a prima facie showing of his right to relief.[97] The issues have been framed and only those issues to which evidentiary support has already been supplied may be addressed.[98] Thus, the subject area appropriate for discovery has been clearly defined and delineated.

"The goal, however, of the procedures that govern habeas corpus is to provide a framework in which a court can discover the truth and do justice in a timely fashion."[99] One purpose of discovery is to assist the search for truth.[100] An adversary is entitled to knowledge of any unprivileged evidence.[101] The purpose of discovery is for the parties to obtain as much information as possible about the facts and issues prior to the hearing.[102] Placing both sides on an equal playing field eliminates gamesmanship, unfair advantage, and surprise.[103] If discovery is available, cross-examination of witnesses will more likely ferret out half-truths, deceptions, and sham defenses.[104] Through discovery, facts are made available that will allow litigation to proceed more efficiently and will educate both sides as to the other's weaknesses and advantages. This will expedite, not frustrate, the proceedings; it will promote, not impede, the efficacious nature of the writ.[105]

Public policy also supports this view. The integrity of the adversary process, the interest in the fair and efficient administration of justice, and the truth determining function of the trial process are promoted by permitting reciprocal discovery.[106] The integrity of the adversary process depends on

97. *See In re* Duvall, 886 P.2d 1252, 1258 (Cal. 1995).
98. *See id.*
99. People v. Duvall, 886 P.2d 1252, 1264 (Cal. 1995).
100. *See* United States v. Nobles, 422 U.S. 225, 231 (1975); United States v. Nixon, 418 U.S. 683, 709 (1974).
101. *Nixon,* 418 U.S. at 709.
102. *See id.*; Hickman v. Taylor, 329 U.S. 495, 501 (1947).
103. *See* Taylor v. Illinois, 484 U.S. 400, 411 (1987).
104. *See Taylor*, 484 U.S. at 411-12; *Hickman*, 329 U.S. at 501.
105. McClesky v. Zant, 499 U.S. 467, 491-493 (1991); Harris v. Nelson, 394 U.S. 286, 297 (1969); Townsend v. Sain, 372 U.S. 293, 311 (1963).
106. *Taylor*, 484 U.S. at 414-15 .

both the presentation of reliable evidence and the rejection of unreliable evidence.[107] For example, access to witness interviews affects a party's ability to present effective cross-examination and relevant rebuttal evidence, attack the credibility of witnesses, impeach or rehabilitate a witness with prior statements, and provides the ability to ferret out perjury.[108] The outcome of a hearing should not be decided on the testimony of witnesses who have not been as vigorously cross-examined and as thoroughly impeached as the evidence permits.

Telling the truth is easy. Yet, determining the truth is a complicated business.[109] The search for the truth can be thwarted as easily by bringing surprise testimony on an unsuspecting opponent as by presenting perjured testimony. Neither promotes the function of the writ.[110] No one has the right to present testimony free from the legitimate demands of the adversarial system. Nor does anyone have the right to request relief from government oppression by presenting half-truths.[111] Therefore, the integrity of the judicial function is promoted by affording both parties discovery, because it will facilitate the disclosure of facts and promote a fair hearing.

To ensure that justice is done, it is imperative that the production of evidence needed by either side be made available.[112] Without reciprocal discovery there is no system of checks and balances to provide each side with sufficient information about the opponent's evidence in support of his claims, so that verification of that support, or lack thereof, may surface. At a criminal trial, the prosecution must provide witness lists and witness statements to the defense to

107. *See id.*; United States v. Nobles, 422 U.S. 225, 241 (1975).

108. *See Taylor*, 484 U.S. at 413.

109. *See id.*

110. *See supra* Part II.

111. *See* United States v. Nobles, 422 U.S. 225, 241 (1975). In *Nobles,* the defense wanted to impeach two key witnesses for the people with the testimony of the defense investigator. But the investigator's report had not been given to the prosecutor. The District Court refused to allow the investigator to testify. The United States Supreme Court upheld this ruling. In *Taylor v. Illinois*, 484 U.S. 400 (1987), as a sanction, the trial court refused to allow the testimony of a witness whose identity was not disclosed during discovery. The United States Supreme Court affirmed. *Id.* at 401.

112. *Nobles*, 422 U. S. at 231.

enable the full benefit of cross-examination. This enhances the truth finding process.[113]

The same conclusion applies in an evidentiary hearing since it is also a trial. "The trial process would be a shambles if either side had an absolute right to control the time and the content of witnesses' testimony."[114] Justice would be thwarted if judgments were based on evidence not thoroughly tested.[115] Both the integrity of and public confidence in the judicial system depend on full disclosure and development of all the facts within the framework of the rules of evidence.[116] To ensure that justice is done, evidence must be available to both sides.[117] "Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony."[118] Any system that would permit evidence to be withheld would cut deeply into the guarantee of due process of law and gravely impair the functions of the courts.[119]

Additionally, the public's interest in maintaining the fair and efficient administration of justice will be served by allowing discovery in evidentiary hearings. Court time and expense will be wasted unless each party has a fair opportunity to review and assemble the evidence. For example, without access to the opponent's evidence, it would be impossible to know which witnesses should be called, which questions should or should not be asked, or whether expert opinions might be required. Each of these would incur needless delay. However, the right to present evidence has limitations. No process can "function effectively without adherence to rules of procedure that govern the orderly presentation of facts and argument to provide each party with a fair opportunity to assemble and submit evidence to contradict or explain the opponent's case."[120]

Without discovery, a proceeding will necessarily consume additional court time and require expenditure of more funds.

113. *See id.*
114. *Taylor*, 484 U.S. at 411.
115. *See id.* at 409.
116. *See id.*
117. Taylor v. Illinois, 484 U.S. 400, 409 (1987).
118. *Id.* at 411-12.
119. *See* United States v. Nixon, 418 U.S. 683, 713 (1974).
120. *Taylor*, 484 U.S. 400, 411 (1987).

Without discovery, each side must ask questions of witnesses in order to ferret out information that could easily be provided by an earlier exchange of information in discovery. The court time and the expense of such proceedings are contrary to the concept of the efficient administration of justice. Discovery would accelerate the dissemination of information that is otherwise delayed.

The potential prejudice to the truth seeking function of the court would also be alleviated by reciprocal discovery in the evidentiary hearings. Without discovery, judgments may be founded on the partial or speculative presentation of facts.[121] Absent privilege or confidentiality, neither party has any valid interest in denying reciprocal access to evidence that could cast light on the issues and promote justice.[122]

If part of a discovery request involves information known only to the petitioner and it is inextricably linked to the evidentiary hearing issues, it is conceivable that the petitioner would be compelled to furnish testimonial evidence. As a general rule, no person may refuse to testify as a witness.[123] However, a criminal defendant has an absolute right not to incriminate himself and not to be called as a witness.[124] A petitioner is not a criminal defendant, however, and an evidentiary hearing is not a criminal proceeding. Thus, it is questionable that these same prohibitions apply to habeas hearings. Furthermore, the petitioner must verify the petition by oath or affirmation,[125] and provide sufficient factual information in support of his claims.[126] This is usually achieved by a declaration. Thus, the defendant has testified, and the opposition should be allowed to cross-examine him on the contents of the declaration relevant to the issues in dispute.[127] If the petitioner refuses, he can withdraw his peti-

121. *Nixon*, 418 U.S. at 709.

122. *See id.* at 411-12; *accord* United States v. Nobles, 422 U.S. 225, 230-31 (1975).

123. *See* Conservatorship of Bones, 234 Cal. Rptr. 724, 726 (Ct. App. 1987).

124. *See id.*; U.S. CONST. amend. V; CAL. CONST. art. I, § 15; CAL. EVID. CODE § 930 (West 1995).

125. *See* CAL. PENAL CODE § 1474 (West 1982); Conservatorship of Bones, 234 Cal. Rptr. at 726.

126. *See* CAL. PENAL CODE § 1473 (West 1982). *See* Conservatorship of Bones, 234 Cal. Rptr. at 726; *In re* Duvall, 886 P.2d 1252, 1258 (Cal. 1995).

127. People v. Madaris, 175 Cal. Rptr. 869, 872 (Ct. App. 1981). A petition for writ of habeas corpus based on petitioner's trial counsel declaration held in-

tion. If the petitioner invokes his Fifth Amendment right not to testify, the referee may make adverse findings of fact on that issue.[128] If the petitioner does answer and furnishes information that might be incriminatory in any later criminal proceedings, the petitioner may be offered whatever immunity is required to waive the privilege, as in other proceedings.[129]

B. *Discovery Should Be Based on Good Cause*

Even though discovery would promote justice, a grant of discovery must be based on "good cause." Good cause means that petitioner must show that the evidence sought is material and relevant to the pending issues, that the requested information is not in his possession and cannot be obtained without the process of the court, and that the sought after evidence would be admissible at the hearing.[130] This showing must be based on concrete facts and not mere speculation.[131]

As previously noted, habeas is a remedy used to right a wrong.[132] It is not a device for investigating possible claims, but a means of vindicating actual claims.[133] A condemned inmate should not be provided the means to re-litigate issues already decided at the state trial.[134] Nor should a condemned inmate be provided with a tool to "explore" in the hope that some basis for collateral relief exists.[135] That is not the pur-

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sufficient. *Id.* *See also* People v. Gonzalez, 800 P.2d 1159, 1204 (Cal. 1990). *See also* People v. Manson, 132 Cal. Rptr. 265, 304 (Ct. App. 1976). *In re* McCarthy, 222 Cal. Rptr. 291 (Ct. App. 1986).

128. The Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify.

129. *See supra* Part II.B. *See also* Baxter v. Palmigiano, 425 U.S. 308 (1976); Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

130. *See Gonzalez,* 800 P.2d at 1205; *In re* Pratt, 170 Cal. Rptr. 80, 130 (Ct. App. 1980).

131. *See Gonzalez,* 800 P.2d at 1205; *In re* Pratt, 170 Cal. Rptr. at 130.

132. *See supra* Part II.B.

133. *See* People v. Gonzalez, 800 P.2d 1159, 1204 (Cal. 1990).

134. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993). "[W]hat we have to deal with on habeas review is not the petitioner's innocence or guilt . . . ." *Id.*; *accord In re* Robbins, 959 P.2d 311, 315 (Cal. 1998). "It is the appeal that provides the basic and primary means for raising challenges to the fairness of the trial." *Collins*, 506 U.S. at 400; *accord In re* Robbins, 959 P.2d at 315; Wright v. West, 505 U.S. 277, 292 (1992). "[H]abeas corpus 'is . . . not a device for reviewing the merits of the guilt determination . . . .'" *Collins*, 506 U.S. at 400; *accord In re* Robbins, 959 P.2d at 315; *West*, 505 U.S. at 292.

135. *See Gonzalez*, 800 P.2d at 1205.

pose of habeas proceedings.[136] An attempt to subvert the proceedings can be prevented by requiring a showing of good cause, which would provide sufficient information for the referee to decide whether the sought after information is material and relevant to the issues in dispute. Otherwise, habeas would provide a forum to re-litigate the state trial and cause further delays in the implementation of the trial court's judgment.

All intendments favor providing procedures that will ensure a complete and fair hearing. Both public policy and the truth seeking function of the adversary process compel this conclusion. Therefore, even though it is not constitutionally required,[137] reciprocal discovery should be provided in state habeas proceedings. Mandated reciprocal discovery would expose the strengths and weaknesses of each side's position and promote the development of issues. Valuable court time and the need for continuances would be reduced. Reciprocal discovery would result in a complete evidentiary hearing where each party has an opportunity to present a more comprehensive picture of the evidence relevant to the issues in dispute. Neither side, nor the public at large, benefits from the judgments of proceedings where the issues are unresolved or inadequately explored.[138]

Good cause would require a petitioner to show that specific facts justifying discovery, that he does not possess the requested information, and that cannot obtain it without the process of the court.[139] It should not be sufficient that the item requested is material and relevant to the issues before the court.[140] Rather, a petitioner should be required to make a threshold showing that the discovery sought would be admissible at the evidentiary hearing in order to eliminate the possibility of a fishing expedition.[141]

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136. *See supra* Part II.A.

137. *See supra* Part II.B.3. *See also* Weatherford v. Bursey, 429 U.S. 545 (1977).

138. The federal rules provide that discovery in habeas corpus proceedings will be had only on leave of court. 28 U.S.C. § 2254 (1997) (governing Rule 6 of Discovery).

139. *See* People v. Gonzalez, 800 P.2d 1159, 1204 (Cal. 1991); *In re* Pratt, 170 Cal. Rptr. 80, 130 (Ct. App. 1980).

140. *See Gonzalez*, 800 P.2d at 1205.

141. *See id.*

Even upon a showing of good cause, the right to discovery should not be absolute. It is not suggested or implied that any party should have the absolute right to inspect any material without regard to the adverse effects of disclosure. The court must retain discretion to protect against the disclosure of information that might violate some legitimate governmental interest, a privilege, or confidentiality.[142] Litigants have always been required to make some preliminary showing, other than a mere desire for all the information in the possession of governmental agencies, in order to obtain discovery of protected or privileged information.[143] For example, the dissemination of a "rap sheet," a history of one's criminal record, specifically affects an individual's right to privacy as guaranteed by Article 1, section 1, of the California Constitution. Accordingly, the Legislature has narrowly defined the instances in which such information may be disseminated,[144] and has established criminal sanctions for its unauthorized dissemination.[145] Because sensitive and private information is involved, traditionally, all doubts are resolved against disclosure.[146] It is only when the sought after evidence is anticipated to play a major role in a defendant's case does the right of privacy give way under the California balancing test.[147]

This constitutional right to privacy is not absolute and may be narrowed only when there is a compelling and opposing state interest. Thus, when compelled disclosure intrudes on constitutionally protected areas, some qualification has been required beyond the claim it might lead to relevant information.[148] In addition, there are important public interests in preserving privileged official information.[149] The California Supreme Court has held that disclosure of official information could be denied if it would jeopardize the

142. People v. Luttenberger, 784 P.2d 633, 645-48 (Cal. 1990). *See, e.g.*, CAL. EVID. CODE § 1040 (West 1995).

143. *See Luttenberger*, 784 P.2d at 645; City of Santa Cruz v. Municipal Court, 776 P.2d 222, 228 (Cal. 1989).

144. *See* CAL. PENAL CODE §§ 13021, 13300 (West 1992).

145. *See* CAL. PENAL CODE §§ 13302, 13303 (West 1992).

146. *See* Loder v. Superior Court, 553 P.2d 624, 634 n.17 (Cal. 1976).

147. *See* Denari v. Superior Court, 264 Cal. Rptr. 261, 268 (Ct. App. 1989).

148. *See id.*

149. *See* CAL. EVID. CODE § 1040 (West 1995); CAL. GOV'T CODE § 6255 (West 1995).

confidentiality of an investigation or reveal the identity of individuals who came forward under an express or implied assurance of anonymity.[150]

There are sound public policy reasons for requiring a petitioner to set forth factually specific good cause. Habeas corpus is meant to ensure that individuals are not imprisoned in violation of the Constitution.[151] Indeed, the writ has been called "the safeguard and the palladium of our liberties."[152] If one can make a proper showing of actual innocence, then a petition will lie even if there have been successive writs.[153] This rule "is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons."[154] "Those few who are ultimately successful in obtaining habeas relief are persons whom society has grievously wronged and for whom [reinstated] liberation is little enough compensation."[155] When discovery is sought that is relevant to the issue of guilt, and the accused cannot support a request for detailed discovery without risking either self-incrimination or a waiver of the attorney-client privilege, there is justification for allowing the accused to set forth a generalized plausible justification for discovery.[156] However, when discovery is sought that is relevant only to an issue collateral to an accused's guilt and there is no risk of self-incrimination or waiver of privilege in justifying the discovery, then a petitioner should be required to demonstrate good cause for discovery.

150. *See* American Civil Liberties Union Foundation v. Deuklmejian, 651 P.2d 822, 829 (Cal. 1982).

151. Herrera v. Collins, 506 U.S. 390, 400 (1993).

152. *In re* Clark, 855 P.2d 729, 737 (Cal. 1993) (quoting *In re* Begerow, 65 P. 828, 829 (Cal. 1901)).

153. *See Herrera*, 506 U.S. at 404; *In re* Clark, 855 P.2d at 759-60.

154. *Herrera*, 506 U.S. at 404.

155. Brecht v. Abrahamson, 507 U.S. 619, 634 (1993) (quoting Fay v. Noia, 372 U.S. 391, 440-41 (1963)).

156. *See* People v. Ochoa, 212 Cal. Rptr. 4 (Ct. App. 1985); People v. Municipal Court, 153 Cal. Rptr. 59 (Ct. App. 1979).

C. *Neither Civil nor Criminal Discovery Statutes Apply to Habeas Proceedings*

1. *Arguments Against Application of Civil Statutes*

Given the premise that reciprocal discovery should be available at evidentiary hearings, the question arises whether the civil discovery statute could be used for that purpose. It will be shown that the procedures available in civil discovery are inappropriate for evidentiary hearings since they can easily be used for abuse because of their breadth.[157] Civil discovery proceeds according to statutory provisions.[158] Diverse methods of discovery are provided, including procedures to obtain oral and written depositions, inspection of documents, physical, and mental examinations, requests for admissions, and interrogatories.[159] However, the provisions of the habeas statute require that the petitioner name the person in "whose custody he is restrained,"[160] the place where he is constrained, and all parties thereto.[161] Service must be made to the District Attorney in whose county petitioner is bound. Thus, the Attorney General for the State of California and the warden of the state prison, where petitioner is incarcerated, are named parties. The civil discovery statute provides that named parties are subject to interrogatories, depositions, and requests for admissions.[162] Civil discovery is available to those named in the lawsuit, as well as to non-parties.[163] Civil discovery includes "any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible as evidence or appears reasonably calculated to lead to the discovery of admissible evidence."[164] The result would be a grant of discovery far beyond what is necessary and would permit the use of the writ to investigate.

157. *See* Harris v. Nelson, 394 U.S. 286, 297 (1969).
158. *See* CAL. CIV. PROC. CODE §§ 2016-2036 (West 1998).
159. *See* CAL. CIV. PROC. CODE §§ 2019-2033.5 (West 1998).
160. *See* CAL. PENAL CODE § 1473 (West 1982).
161. *See id.*
162. *See* CAL. CIV. PROC. CODE § 2019 (West 1998).
163. *See* CAL. CIV. PROC. CODE § 2020(a)(West 1998).
164. CAL. CIV. PROC. CODE § 2017(a) (West 1998).

If these methods were available for discovery in capital habeas matters, both the methodology and the breadth of its application would promote an investigative use repudiated by the *Gonzalez* court. Since not only evidence relevant to the subject matter is discoverable, but also anything likely to lead to the discovery of admissible evidence, the discovery procedure becomes a tool of investigation with which one can explore possible violations in addition to actual violations. The broad public interest in the timely resolution and finality of judgments would be thwarted since these procedures extend, rather than shorten, litigation.[165] Parties lacking knowledge of any facts pertinent to the resolution of the issues under inquiry, such as the warden who has custody of the petitioner, would be targets of such discovery requests.

It is for these reasons that courts have decried the application of civil discovery to habeas petitions.[166] Justice Lucas, writing for the California Supreme Court in *Duvall*, noted that "we will not engraft on habeas corpus procedures the myriad rules and technicalities applicable to civil proceedings."[167] Furthermore, under civil discovery, unless a request to limit discovery is made, the parties may initiate the use of depositions or interrogatories without leave of the court.[168] Use of this statutory grant could result in abuses and delay. In the same vein, the United States Supreme Court in *Harris v. Nelson*, stated that the specific provisions of the civil discovery statute "are ill-suited to the special problems and character of such proceedings."[169] The court reasoned that a literal application of such modes of discovery would be circuitous, burdensome, and time consuming, concluding that such a broad-ranged inquiry would be neither necessary nor appropriate in habeas proceedings.[170] As the *Harris* court stated:

> [U]nless there is a measure of responsibility in the originator of the proceeding, the "plaintiff" or petitioner, this

165. *See* Harris v. Nelson, 394 U.S. 286, 296 (1969).

166. *See* People v. Duvall, 886 P.2d 1252, 1260 n.4 (Cal. 1995).

167. *Id. See also* Joe Z v. Superior Court, 478 P.2d 26, 28 (Cal. 1970) (refusing to apply the rules of civil discovery to juvenile proceedings, also "essentially civil").

168. *See* CAL. CIV. PROC. CODE § 2019 (West 1998).

169. *Harris*, 394 U.S. at 296.

170. *Id.* at 296-97.

> procedure can be exceedingly burdensome and vexatious. The interrogatory procedure would be available to the prisoners themselves . . . . The burden upon courts, prison officials, prosecutors and police, which is necessarily and properly incident to the processing and adjudication of habeas corpus proceedings, would be vastly increased; and the benefit to prisoners would be counterbalanced by the delay which the elaborate discovery procedures would necessarily entail.[171]

In a footnote, the *Harris* court acknowledged and concurred with the dissent's concern for the necessity of rules in the area of discovery in habeas corpus proceedings.[172] Shortly thereafter, Rule 6 was promulgated,[173] which provides for procedures governing discovery in habeas cases in federal courts. However, the state of California does not have a comparable statute.

Without doubt, civil discovery statutes were not designed to overturn final judgments.[174] Nor does the value inherent in civil discovery, that of promoting settlement,[175] operate realistically in a habeas corpus setting. Therefore, the philosophical underpinnings of civil discovery would obviously thwart the efficiency of collateral proceedings.

Lastly, the expense of civil discovery forecloses its use as a realistic option in habeas corpus evidentiary hearings.

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171. Harris v. Nelson, 394 U.S. 286, 296-97.

172. *Id.* at 300-01 n.7.

173. 28 U.S.C. § 2254 (1994). Rule 6 of 28 U.S.C. 2254 provides:

> (a) Leave of court required. A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the [J]udge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the [J]udge for a petitioner who qualifies for the appointment of counsel . . . .
>
> (b) Requests for discovery. Requests for discovery shall be accompanied by a statement of the interrogatories or requests for admission and a list of the documents, if any, sought to be produced.
>
> (c) Expenses. If the respondent is granted leave to take the deposition of the petitioner or any other person the [J]udge may as a condition of taking it direct that the respondent pay the expenses of travel and subsistence and fees of counsel for the petitioner to attend the taking of the deposition.

Id.

174. *See* Harris v. Nelson, 394 U.S. 286, 296 (1969).

175. *See id.*

Payment of transcription fees, court reporters, deposition costs, and security arrangements, added to costs already deemed astronomical, would escalate the state's financial burden.

2. *Arguments Against Application of Criminal Statutes*

Criminal discovery is also inappropriate for habeas proceedings. In 1990, Proposition 115 added the provisions for discovery in criminal cases to the California Penal Code and the California Constitution.[176] It is clear from the stated legislative intent and from the terms used, that the discovery statute applies solely to criminal trials. For example, section 1054(e) provides that the provisions of the discovery statute are the exclusive means, save for constitutional requirements, of discovery in criminal cases.[177] Section 1054.5 limits the issuance of discovery orders in criminal cases to the statutory provisions of the chapter.[178] Provisions are made for reciprocal discovery. Section 1054.1 sets forth the discovery obligations of the prosecutor, which includes turning over to defense counsel witness names and addresses and defendant statements, relevant real evidence, prior felony convictions of any witness, exculpatory evidence, recorded statements, reports of expert witnesses, and test results.[179] Section 1054.2 provides that addresses and telephone numbers of either witnesses or victims may not be disclosed to a defendant without leave of court. Section 1054.3 sets forth the reciprocal discovery obligations of the defense to the prosecutor. Witness names, addresses, written and recorded statements, results of physical or mental examinations and scientific tests, and any real evidence must be provided to the prosecutor.[180] Section 1054.7 provides a work product privi-

176. CAL. CONST. art. I, § 30; CAL. PENAL CODE §§ 1054-1054.7 (West 1999).

177. CAL. PENAL CODE § 1054(e) (West 1999).

178. Penal Code section 1054.5(a) provides:

> No order requiring discovery shall be made in criminal cases except as provided in this chapter. This chapter shall be the only means by which the defendant may compel the disclosure or production of information from prosecuting attorneys, law enforcement agencies which investigated or prepared the case against the defendant . . . .

CAL. PENAL CODE § 1054.5(a) (West 1999).

179. CAL. PENAL CODE § 1054.1(a)-(f) (West 1999).

180. *See* CAL. PENAL CODE § 1054.3(a)-(b) (West 1999).

lege for defense attorneys and explicitly retains other privileges set forth by statute or the U.S. Constitution. Finally, section 1054.7 provides a time schedule for the disclosure of information of at least 30 days prior to trial. However, as shown above, both federal and state courts agree that habeas proceedings are not criminal.

It is clear from the language of the statute that the draftsmen did not contemplate that its provisions would be applied to habeas corpus proceedings. Section 1054.1(b) requires disclosure by the "prosecuting attorney" to include statements of all "defendants" and reciprocal discovery by the "defendant" is provided for in section 1054.3. However, in a habeas proceeding these terms are simply inapplicable. For example, there is no prosecuting attorney. The defendant is both the petitioner and the moving party and has the burden of proof.[181] The people are the defendants who must try to uphold a presumptively valid judgment.[182] Furthermore, several subdivisions refer to "victims,"[183] an inappropriate term in habeas proceedings, and section 1054.1(e) requires that the people disclose all exculpatory evidence to the defense. Of course, such evidence is relevant to the issue of a defendant's guilt or innocence, but a habeas proceeding does not involve that issue.[184] Therefore, this language is a further indication that the draftsmen did not intend the statute to apply to habeas proceedings.

Furthermore, section 1054.3 of the California Penal Code precludes the defendant's statements from discovery by the prosecutor.[185] Whether this restriction would be applicable in

181. *See* CAL. PENAL CODE § 1473, 1474, 1477 (West 1982).

182. *See* CAL. PENAL CODE § 1478, 1479, 1480, 1481 (West 1982).

183. Penal Code section 1054(d) provides: "To protect victims . . . from danger, harassment, and undue delay of the proceedings." CAL. PENAL CODE § 1054(d) (West 1999). The Penal Code provides "(a) [t]he prosecutor shall disclose to the defendant or his or her attorney . . . (d) the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. CAL. PENAL CODE § 1054.2(a),(d) (West 1999). The Penal Code also provides "(a) [n]o attorney may disclose or permit to be disclosed to a defendant the address or telephone number of a victim . . . ; "(b) the court shall endeavor to protect the address and telephone number of a victim . . . ." CAL. PENAL CODE § 1054.2(a)-(b) (West 1999).

184. *See In re* Harris, 855 P.2d 391, 396 n.4 (Cal. 1993); *In re* Clark, 855 P.2d 729, 761 n.36 (Cal. 1993).

185. CAL. PENAL CODE § 1474(1)-(3) (West 1982).

a capital habeas setting is questionable. As noted earlier,[186] the courts appear to agree that the civil rule of an adverse inference applies if the defendant refuses to testify. In the context of a habeas petition, the petitioner has testified by submitting a verified application for habeas.[187] By testifying, the petitioner has waived his privilege under the Fifth Amendment.[188] The Fifth Amendment protects a defendant against being involuntarily called as a witness against himself in a criminal proceeding.[189] But, if a defendant in a criminal trial chooses to testify, then he, like any witness, may have his credibility tested.[190] On cross-examination, that same defendant cannot claim his Fifth Amendment privilege not to testify on any matter reasonably related to the subject matter of his direct testimony.[191] The breadth of the defendant's waiver is determined by the scope of relevant cross-examination and not by the actual direct testimony. Therefore, section 1054.3 would be inapplicable in a habeas evidentiary hearing.

The petitioner, by virtue of his status as the moving party of the writ, foregoes any privilege not to testify at the evidentiary hearing.[192] When a criminal defendant files a petition for writ of habeas corpus, he voluntarily becomes a witness. He has set forth certain facts that he claims are true. While some of the allegations in the petition are legal, many of the allegations are facts solely or mainly within the petitioner's knowledge. As one who has alleged a violation of his constitutional rights, there is no other person in a better position to testify to the facts involved. Furthermore, once the petitioner chooses to present the petition with his version of the facts, he has voluntarily become a witness, placed his

186. *See supra* Part II.B.2, II.B.3.

187. *See* Hendricks v. Vasquez, 908 F.2d 490, 491 (9th Cir. 1990); People v. McCarthy, 222 Cal. Rptr. 291, 292-93 (Ct. App. 1986).

188. *See* United States v. Black, 767 F.2d. 1334, 1341 (9th Cir. 1985).

189. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

190. *See* CAL. EVID. CODE § 780 (West 1998).

191. *See* Brown v. U.S., 356 U.S. 148 (1958); U.S. v. Hearst, 563 F.2d 1331, 1340 (9th Cir. 1978); People v. Cooper, 809 P.2d 865, 893 (Cal. 1991); People v. Gates, 743 P.2d 301, 312 (Cal. 1987); People v. Ing, 422 P.2d 590, 594 (Cal. 1967).

192. *In re* Gray, 176 Cal. Rptr. 721, 722 (Ct. App. 1981). "Thus we hold that there is no attorney-client privilege as to matters put in issue in a habeas corpus proceeding where the competency of defendant's trial attorney is at issue." *Id.*

credibility in issue, and thereby waived any protection under the Fifth Amendment.[193] It would be anomalous to permit a petitioner to subsequently assert the Fifth Amendment to shield himself from testifying further on the facts and issues he has put in dispute.[194]

If this were permitted, only the petitioner's side would be presented. A petitioner would thus be permitted not only to determine the area of inquiry, he would determine what evidence would be presented and could preclude any testing of his evidence before the court. For the petitioner to assert that his claims are correct, his statements are true, and that relief should be granted, while simultaneously asserting that any attempt to verify his claims or test the truth of his statements is precluded by the Fifth Amendment is unacceptable.

> [It would make] the Fifth Amendment not only a safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell .... The interests ... and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege against self-incrimination.[195]

Procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution those procedures make toward uncovering constitutional error.[196]

Finally, because the petitioner has placed the allegations in the petition in dispute, he has the burden of proof.[197] Com-

193. Ohio Adult Parole Authority v. Woodward, 523 U.S. 272 (1998).

194. Recently in *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272 (1998), the United States Supreme Court emphasized the fact that the Fifth Amendment protects only against compelled self-incrimination. "Compulsion" for Fifth Amendment purposes does not include a defendant's testimony or voluntary statement made as the result of a decision or choice generated by the pressures of the criminal procedural system. The Court stated that "there are undoubted pressures ... pushing the criminal defendant to testify. But it has never been suggested that such pressures constitute 'compulsion' for Fifth Amendment purposes." *Id.*

195. Brown v. United States, 356 U.S. 148, 156 (1958).

196. *See* Barefoot v. Estelle, 463 U.S. 880, 887 (1983).

197. *See In re* Fields, 800 P.2d 862, 866 (Cal. 1990); *In re* Martin, 744 P.2d

parable to the assertion of an affirmative defense, the petitioner must develop his claim and present proof sufficient by a preponderance of the evidence.[198] It would appear that the petitioner could be compelled to produce discovery of his statements and to testify on issues he has put in dispute. Therefore, section 1054.3(a), which limits the defendant's duty of disclosure, would be inapplicable in a habeas proceeding. Consequently, these provisions[199] apply to a criminal trial where the determination of guilt or innocence is at issue, not to the adjudication of a civil wrong. Therefore, they are ill suited to the character and nature of habeas proceedings.

When Proposition 115 was added to the California Penal Code and the California Constitution in 1990,[200] no reference was made to the habeas corpus provisions even though they were located in the same statute.[201] It is a rule of statutory construction that the failure of the legislature to change the law in a particular respect when the subject matter is generally before it, indicates an intent not to disturb those aspects of the law not expressly amended.[202] Even though the criminal discovery statute was added by initiative, the rule of statutory construction still applies.[203] Therefore, the clear language of the statute combined with the stated intent of its application to criminal trials,[204] precludes its application to habeas proceedings.

The fact that no provisions for discovery were added to the habeas corpus provisions[205] when this issue was before the Legislature, is further indication that discovery under the criminal statute is unavailable in those proceedings. It is

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374, 390 (Cal. 1987).

198. *See* Curl v. Superior Court, 801 P.2d 292, 293 (Cal. 1990); *In re* Imbler, 387 P.2d 6,8 (Cal. 1963); CAL. EVID. CODE § 115 (West 1995).

199. CAL. PENAL CODE § 1054(e) (West 1999); CAL. PENAL CODE §§ 1054.1-.3, -.5-.7 (West 1999).

200. CAL. CONST. art. I, § 30.

201. CAL. PENAL CODE §§ 1054 (West 1999). CAL. PENAL CODE §§ 1474 (West 1999).

202. *See* Walker v. Superior Court, 763 P.2d 852, 863 (Cal. 1988); Baxter v. Palmigiano, 425 U.S. 308, 310 (1976).

203. *See In re* Lance W., 644 P.2d 744, 791-94 (Cal. 1985). In construing constitutional and statutory provisions, whether by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. *See id.*

204. *See supra* notes 70, 75.

205. Added by Proposition 115, approved June 5, 1990.

also a well established principle of statutory construction that when the Legislature amends a statute without altering portions of the provisions that have previously been judicially construed, the Legislature is presumed to have acquiesced to such judicial construction.[206] Thus, the fact that the provisions for discovery in habeas proceedings were not added is further indication that the criminal discovery statute does not apply to collateral proceedings.

IV. CONCLUSION

It is submitted that these reasons provide a compelling argument that a separate discovery statute for capital habeas evidentiary proceedings is needed, and that it would be inappropriate to apply either civil or criminal discovery to such proceedings. Concern has been raised in federal and state legislatures that the pace of habeas litigation has negatively impacted the judicial process and public opinion of the criminal justice system.[207] Retrying defendants after lengthy ha-

206. *See* Fontana Unified School District v. Burman, 793 P.2d 689, 696 (Cal. 1988).

207. In an attempt to shorten the habeas process, in 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1217 (1994), which applies to federal habeas challenges to state criminal judgments. Calderon v. U.S. District Court, 98 F.3d 1102, 1105 (9th Cir. 1996). It requires a stringent showing of innocence by clear and convincing evidence in a successive petition or else the petition is dismissed. 28 U.S.C.A. § 2244(b)(2)(B) (West 1999). "This act was intentionally drafted 'to require extraordinary showings before a state prisoner can take a second trip around the extended district-court-to-supreme-court' federal track." Stewart v. Martinez-Villareal, 140 L. Ed. 2d 849, 858 (1998) (Scalia, J., dissenting).

Because of the "profound societal costs" that attend the exercise of habeas jurisdiction, the United States Supreme Court has imposed "significant limits on the discretion of federal courts to grant habeas relief." Calderon v. Thompson, 140 L. Ed. 2d 728, 746 (1998). The Court has limited a district court's discretion to entertain abusive writs. *See* McClesky v. Zant, 499 U.S. 467, 487 (1991). The Court has limited a court's discretion to entertain procedurally defaulted claims. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977). The Court has also limited a court's discretion to give retroactive application to "new rules" in habeas cases. *See* Teague v. Lane, 489 U.S. 288, 308-10 (1989). In addition, the Court has limited a court's discretion to grant habeas relief on the basis of trial error. *See* Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993). The Court held a recall of a mandate not controlled by the express terms of the AEDPA was a grave abuse of discretion. *See Calderon*, 140 L. Ed. at 753.

"Finality [of criminal convictions] is essential to both the retributive and the deterrent functions of criminal law. Neither innocence nor past punishment can be vindicated until the final judgment is known." *Calderon*, 140 L.

beas review occurs much later than do trials following reversal on direct review.[208] The passage of time diminishes the reliability of criminal adjudications. When a habeas petitioner succeeds in obtaining a new trial or a new penalty phase, the erosion of memory and loss of witnesses, which necessarily occur with the passage of time, diminish that reliability.[209] Obtaining a conviction on retrial imposes significant social costs, additional time, and is more difficult. This frustrates society's interest in the prompt administration of justice. We, as a society, have a high degree of confidence in our criminal trials because of the unparalleled protections offered to a criminal defendant under our Constitution.[210] Society also has an interest in insuring that at some point a

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Ed. 2d at 747 (quoting McClesky v. Zant, 499 U.S. 467, 491 (1991)). "Without finality, the criminal law is deprived of much of its deterrent effect." *Id.* "Finality enhances the quality of judging . . . and serves to preserve the federal balance. Federal habeas review of state convictions frustrates both the state's sovereign power to punish offenders and their good faith attempts to honor constitutional rights." *Id.* The state bears "the significant costs of federal habeas review." *Id.* "Only with real finality can the victims of crime move forward knowing the moral judgment will be carried out." *Id.* "To unsettle expectations of finality [by granting a writ after having first denied it) is to inflict a profound injury to the powerful and legitimate interest in punishing the guilty. *Id.*; Herrera v. Collins, 506 U.S. 390, 421 (1993). Costs imposed by appellate and collateral review spanning 13 years "are as severe as any that can be imposed in federal habeas review." *Calderon,* 140 L. Ed. 2d at 748. "[I]t would be the rarest of cases where the negligence of two judges . . . is sufficient grounds to frustrate the interests of a state of some 32 million persons in enforcing a final judgment in its favor." *Id.* at 745.

On the state level, the California Supreme Court has adopted stringent time constraints for filing habeas petitions. *See In re* Duvall, 886 P.2d 1252, 1261 (Cal. 1995); *In re* Saunders, 472 P.2d 921, 923 (Cal. 1970); *In re* Lindley, 177 P.2d 918, 927 (Cal. 1947). In the companion cases, *In re* Clark, 855 P.2d 729 (Cal. 1993), and *In re* Harris, 855 P.2d 391 (Cal. 1993), the court limited habeas review, set new standards for the grant of review and required justification and explanation for delay, or risk a summary dismissal.

> "Habeas corpus is an extraordinary remedy that was not created for the purpose of defeating or embarrassing justice but to promote it . . . the availability of the writ . . . must be tempered by . . . the interest of the public in the orderly and reasonably prompt implementation of its laws and to the important public interest in the finality of judgments. For this reason, a variety of procedural rules have been recognized that govern the proper use of the writ . . . ."

In re Robbins, 959 P.2d 311, 316 (1998). "[P]rocedural bars [are imposed] as a means of protecting the integrity of our own appeal and habeas corpus process." *Id.* at 316 n.1 (emphasis in original).

208. *See* Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

209. *See id.*

210. *See id.*

criminal judgment becomes final.

A discovery statute would eliminate time consuming litigation concerning the availability and scope of discovery, thereby shortening the collateral proceeding. It would also promote uniformity in rulings and thereby render confidence in the outcome. Requiring that the proponent of a discovery motion show good cause prevents the use of habeas as an investigative tool and provides the referee a standard with which to exercise his discretion. The statute should require: 1) a written motion that describes with specificity the items sought; 2) a statement that the item is not in the movants' possession and cannot be obtained otherwise; 3) a statement as to the materiality and relevance of the requested items to the issues; 4) and a brief statement, citation, or theory of admissibility.

All agree that somewhere, sometime, litigation must end. The recommendations set forth in this article would facilitate, rather than forestall, the habeas process and would aid, rather than hinder, the ascertainment of truth. Most importantly, it would assist the efficacious nature of the writ of habeas corpus.